United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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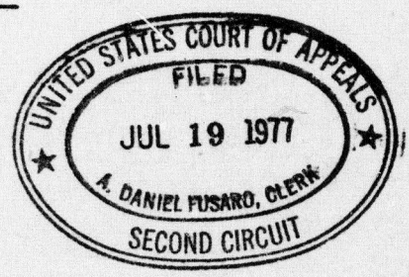
IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



FLLI MORETTI CEREALI S.p.A.,

Plaintiff-Appellee,

-against-

CONTINENTAL GRAIN COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THE DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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FLLI MORETTI CEREALI S.p.A., :

Plaintiff-Appellee, :

v. :

CONTINENTAL GRAIN COMPANY, :

Defendant-Appellant. :

----------x

Docket No. 77-7130

REPLY BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

A most significant thing about Moretti's answering brief is what it does not discuss. For example, Moretti does not attempt to rebut our argument that Setion 489 of the Judiciary Law is inapplicable as a matter of law to the assignment here at issue. Indeed, Moretti says nothing about the terms, purposes or scope of that statute.

Nor does Moretti disagree that the District Court drew inferences and resolved ambiguities against Continental on Moretti's motion for summary judgment. And Moretti brushes aside the fact that the decision below was rendered without affording Continental a meaningful opportunity to be heard on the issue which the District Court found to be dispositive.

Instead, Moretti relies principally on three red herrings:

(1) Moretti argues that it was entitled under Rule 54(b) to final judgment on its wheat contract claim regardless of the validity of the assignment or the merit of Continental's counterclaim and set-off.

Moretti is wrong. To be so entitled, Moretti would have to establish, inter alia, that the District Court, in the exercise of its sound discretion, found that there was no just cause for delaying entry of final judgment on Moretti's wheat claim while Continental's soybean counterclaim remained to be adjudicated. In fact, the District Court made no such finding, and Moretti suggests no reason why it should have done so.

(2) Moretti argues, in cursory fashion, that there was no running account between Moretti and Continental.

As we said in our main brief, there can be no question that there is a genuine issue of fact on this point (Br. 14)*. The proofs submitted by the parties were in direct conflict (contrast the record at 55-57 with 75-77), and the District Court made no finding on this issue.

(3) Turning to the real issue on this appeal -- the

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* "Br. 14" refers, here and hereafter, to page 14 of our main brief. Moretti's brief will be referred to as "Mor. Br.", and pages in the Joint Appendix will be referred to by numbers in parenthesis not preceded by letters.

validity of the assignment between the DISC and its parent -- Moretti relies on the notion that "[i]n the moving papers plaintiff challenged the assignment as collusive . . . [and] [d]efendant never took up the challenge and responded only by establishing that Export was a separate corporation . . . organized for certain tax advantages." (Mor. Br. 14).

This distorts the record in two important respects. First, there was no "challenge" below. On the contrary, in papers submitted in support of its motion for summary judgment predicated on other grounds, Moretti conceded that "there is a substantial issue" concerning the assignment's validity (48). That concession called for no reply.

More important, Continental established on the record below much more than that its DISC was a separate corporation organized for tax purposes. Continental in fact demonstrated:

-- that, to reduce its tax liability consistent with the Internal Revenue Code, income from export sales is deemed to be the DISC's to the maximum extent allowable, and losses to be Continental's (59);

-- that the DISC assigned its claim under the soybean contract to Continental shortly after Moretti repudiated that contract (56);

-- that the purpose of this assignment was the same purpose behind the DISC-parent relationship, i.e., tax considerations (56);

-- that the assignment recited that it was made for good and valuable consideration (115).

Despite this record, Moretti contends that it is

"significan[t]" that Continental's answering affidavit below did not say in haec verba that the assignment was motivated by tax considerations (Mor. Br. 16).

We respectfully submit that it ill becomes Moretti to complain of any lack of directness in Continental's answering papers concerning the circumstances of the assignment. By virtue of Moretti's own moving papers, the assignment simply was not at issue at that time, and Continental was under no obligation to explain at any length or with great precision the background of the assignment.

POINT I

THE ASSIGNMENT WAS NOT INVALID UNDER SECTION 489

We have noted that Moretti makes no effort to refute the authority which has construed Section 489 not to apply to an assignment such as that between the DISC and its parent.*

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* Instead of addressing the statute which governs the issue presented by this appeal, Moretti relies primarily on case law under 28 U.S.C. § 1359, which relates to assignments which purport to confer diversity jurisdiction. Green & White Construction Co., Inc. v. Cormat Construction Co., 361 F. Supp. 125 (N.D. Ill. 1973), Fowler v. Coals, 418 F. Supp. 909 (E.D. Tenn. 1976), Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969), and Prudential Oil Corp. v. Phillips Petroleum Co., 546 F.2d 469 (2d Cir. 1976), all cited by Moretti, each concern Section 1359 of the United States Code and have nothing to do with Section 489 of the Judiciary Law of New York.

(Footnote continued)

We submit that this case law, unrebutted and unchallenged, is dispositive of this appeal: The District Court held that the assignment violated Section 489. That holding was incorrect as a matter of law. The decision below was predicated upon that incorrect holding and consequently should be reversed.

(Footnote continued)

Moretti cites, but does not discuss, three cases under Section 489. Two of these, American Restaurant China Manufacturers Association, Inc. v. Corning Glass Works, 24 M.2d 634, 198 N.Y.S.2d 366 (Erie Co. 1960) and Bennett v. Supreme Enforcement Corp., 250 App. Div. 265 (1st Dep't), aff'd, 275 N.Y. 502 (1937), were discussed in our main brief, at pages 22-23, where we showed that those assignments were plainly champertous. And the third case, American Optical Company v. Curtiss, 56 F.R.D. 26 (S.D.N.Y. 1971), is similarly inapt: As that court emphasized, the assignment expressly required the assignee to institute a lawsuit, 56 F.R.D. at 30, and the assignee "had nothing to do with the relationships between the individual defendants and the University, which form the basis for the instant complaint," 56 F.R.D. at 31. These cases do not in the least compromise the rule that an assignment does not violate Section 489 where there is no hint of champertous purpose or where the relationship of the assignor and the assignee to the transaction which gave rise to the claim makes it clear that the assignment was made for a proper purpose. Moses v. McDivitt, 88 N.Y. 62 (1882); Famous Artists Schools, Inc. v. Cook, 121 N.Y.S.2d 457 (Municipal Ct. of N.Y. 1953); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 M.2d 1090, 244 N.Y.S.2d 602 (N.Y. Co. 1963); Moran Towing & Transportation Co. v. Conners-Standard Marine Corp., 226 F. Supp. 1013, 1018 (S.D.N.Y.), aff'd, 316 F.2d 811 (2d Cir. 1963).

POINT II

A GENUINE ISSUE OF FACT EXISTS CONCERNING THE PURPOSE OF THE ASSIGNMENT

Moretti's response to this point also disregards the applicable law. There is not one word in Moretti's brief acknowledging or dealing with the fact that on a motion for summary judgment the facts in dispute must be viewed in the light most favorable to the party opposing the motion. Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1320 (2d Cir. 1975).

Nor does Moretti discuss the rule that an assignment is invalid only if its sole purpose is to bring suit, Moses v. McDivitt, 88 N.Y. 62 (1882), and that the issue of motive in making an assignment is an issue of fact inappropriate for summary judgment. Sprung v. Jaffe, 3 N.Y. 2d 539 (1957).

Moretti's discussion of the facts is defective in other respects as well:

1. Moretti relies upon the chronology of events and even presents a concise chronological chart (Mor. Br. 10-11). But that chart omits one rather pertinent event -- Moretti's repudiation of the soybean contract. That repudiation occurred on February 10, 1976, a matter of days before the DISC assigned to its parent its rights in the soybean contract (55-56, 115-116).

In other words, the assignment was prepared and executed very soon after Continental realized that Moretti was repudiating and that the soybean contract could represent a

substantial loss. This is in all respects consistent with what the other evidence indicates: that the assignment was made to minimize a tax obligation by shifting away from the DISC any possible loss on a defaulted contract.

2. Moretti reads the final paragraph of the assignment and concludes that it did not divest the DISC of all interest in the soybean contract. This argument ignores the bulk of the assignment -- its first four paragraphs -- which unequivocably assigns all right, title and interest under that contract from the DISC to the parent. In truth, Moretti's argument rests solely upon the final clause of the assignment, which inexplicably grants certain rights to the "Assignor" (emphasis added).

Acknowledging that this wording conflicts with all that comes before it, Moretti argues that Continental may not have the benefit of the ambiguity. Moretti justifies this position -- which is directly contrary to the rule, applicable upon a motion for summary judgment, that all ambiguities are to be resolved against the movant -- by reference to the doctrine that a document is construed against the party who drafted it (Mor. Br. 12-13). This afterthought -- Moretti urged no such doctrine below, and the District Court did not apply it -- is specious, for several reasons:

The doctrine Moretti relies upon is invoked only to reach a reasonable and practical construction of a document, National Equipment Rental, Ltd. v. Reagin, 338 F.2d 759, 763

(2d Cir. 1964), and then only as a last resort, after all other evidence has been heard concerning what the parties intended. 3 Corbin, Contracts, § 559, at 262 and 268.

Here, Moretti seeks to achieve a reading of the assignment which is totally at odds with the manifest intent of the parties, as disclosed by every word of the document except the word "Assignor". Moreover, Moretti seeks to do so on a motion for summary judgment wherein no evidence has been taken concerning the intention of the parties. Recall that this language in the assignment was first noticed sua sponte by the District Court in its opinion below, and that Continental has had no opportunity to address the matter (Br. 18-19).

Furthermore, Moretti does not address our contention that it is an equally plausible inference that the inconsistency in the assignment was caused by a typographical error, and nothing more (Br. 29-30). Such an error is not an "ambiguity" to which the contra proferenten doctrine applies. As the mistaken language was not deliberately chosen by the drafter, the doctrine has no force and effect.*

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* Moretti's argument is wrong for another reason. The parties to the assignment in question do not disagree about its meaning; it is Moretti, a stranger to the agreement, who seeks to use the contra proferenten doctrine as a sword against the parties to the assignment. Moretti cites no authority for such a 'third-party-beneficiary-of-the-ambiguity' application of the doctrine, and we have found none. In each of the three cases which Moretti does cite (Mor. Br. 13), a party to a contract asserted the doctrine against another party to that contract.

3. Moretti argues that "all of the subsequent [i.e., after the assignment] activities in furtherance of the soybean claim" (Mor. Br. 15) indicate that the DISC retained rights in the soybean contract. In truth, Moretti is referring to one fact and one fact alone -- that the soybean arbitration in London was brought in the name of the DISC, rather than in the parent's name.

Moretti, however, ignores the showing in our main brief, at pages 30-31, that it is most likely that this nomenclature evidences nothing at all concerning the DISC's interest in the contract, and that the proceeding went forward in the DISC's name simply because the DISC was the entity whose name was on the soybean contract. Nor does Moretti refute our contention that it was improper for the District Court to draw a contrary inference on this motion for summary judgment.

In sum, Moretti has not met its heavy burden on the motion for summary judgment. No reasonable reading of the record, viewed in the light most favorable to Continental, supports the conclusion that the sole purpose of this assignment was to bring suit, or that this was a champertous transaction.

POINT III

THE DECISION BELOW WAS BASED UPON A GROUND WHICH WAS NOT SET FORTH IN MORETTI'S RULE 9(g) STATEMENT, AND WAS MADE WITHOUT AFFORDING CONTINENTAL A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE ISSUE WHICH THE DISTRICT COURT FOUND TO BE DISPOSITIVE; AT THE VERY LEAST, THE DECISION SHOULD BE VACATED AND REMANDED FOR FURTHER CONSIDERATION

Moretti has no answer to our showing that Continental did not have a meaningful opportunity to be heard on the issue of the assignment's validity. Moretti's only dissent is its disingenuous argument that it "challenged" Continental to establish that the assignment was proper. Of course, there was no such challenge.

Accordingly, at the very least, the summary judgment below should be vacated, and the motion given further consideration in the district court.

POINT IV

MORETTI AND CONTINENTAL INTENDED TO SETTLE DISPUTES BETWEEN THEM WITHOUT REGARD TO CORPORATE SUB-ENTITIES; ACCORDINGLY, CONTINENTAL MAY ASSERT RIGHTS IN THE SOYBEAN CONTRACT WITHOUT REFERENCE TO THE ASSIGNMENT

We asserted in our brief that the summary judgment below is defective for this fourth, distinct reason (Br. 34-36). Moretti's response itself demonstrates that questions of fact

exist concerning whether the parties intended to deal without regard to corporate sub-entities.

Moretti's principal point is that one of the four facts we relied upon -- that in correspondence with Continental, Moretti acknowledged that it was dealing with Continental despite the use of subsidiaries for incidental purposes (Br. 35) -- is not in the record and should be disregarded.

We submit that, where the issue is whether the District Court improperly granted summary judgment on a ground not fully addressed or considered by the parties, and the appellant consequently has not had a meaningful opportunity to make a record below, it is proper for appellant to make an offer of proof, consisting of documentary evidence not in the record, for this Court's consideration. Moretti does not deny the existence, the veracity, or the significance, of that evidence.

Neither does Moretti dispute that the DISC is a mere bookkeeping mechanism, and that Moretti had to be aware of that fact (Br. 35-36).

Moretti does dispute our contention that the pleadings and the papers below show that both Moretti and Continental acknowledged that Continental was the real party in interest to contracts with Moretti even though, for incidental reasons, it was Continental's sub-entities which executed those contracts (Br. 35). But Moretti's discussion of these matters (Mor. Br. 19) only demonstrates that they present issues of fact which are

muddy indeed. For example, Moretti argues that the record below is wrong: we pointed out in our main brief that one of the contracts upon which Moretti's wheat claim is based is a contract between Moretti and the DISC (24-25); yet Moretti sued Continental and did not join the DISC as a party defendant (Br. 35). Moretti now suggests that there was a mistake and that this contract "for some reason" was not "corrected" to name Moretti and Continental as the contracting parties (Mor. Br. 19).

Finally, Moretti's cursory legal argument, to the effect that Continental may not assert rights in the soybean contract absent an assignment, is unpersuasive. The cases cited by Moretti are in no sense "analogous" (Mor. Br. 19) to the issue at bar. Those cases involve questions of proper service of process under State law, Cook v. Bostitch, 328 F.2d 1 (2d Cir. 1964); Compania Mexicana v. Compania Metropolitana, 250 N.Y. 203 (1928), and other jurisdictional issues, e.g., United Continental Tuna Corporation v. United States, 550 F.2d 569 (9th Cir. 1977) (the applicability of the Public Vessels Act). These questions have no bearing on a parent's right to assert an interest in a contract executed by its DISC subsidiary where all the parties to the transaction intended that the parent have that right.

Continental is not asserting a unilateral right to pick and choose when it will ignore the corporate status of its constituent parts. Continental is asserting that both Continental and Moretti agreed to deal with the parent companies of each, regardless of the use of corporate sub-entities for

incidental purposes. It was that agreement that made Continental a real party in interest to the soybean contract and enabled Continental to assert rights in that contract.

There is substantial evidence that this was the case, and Continental should be given an opportunity to prove it.

POINT V

MORETTI'S OTHER CONTENTIONS ARE WITHOUT MERIT

Moretti puts some emphasis in this appeal on two arguments which were not addressed by the District Court: (1) that Moretti is entitled to a final judgment on its wheat claim under Rule 54(b) of the Federal Rules of Civil Procedure, and (2) that there is no triable issue concerning the existence of a running account between the parties.

The District Court did not grant Moretti any relief on these grounds because the arguments are without merit.

Rule 54(b)

Moretti is not entitled to final judgment on its wheat claim irrespective of the merit of Continental's counterclaim and set-off.

Under Rule 54(b) of the Federal Rules of Civil Procedure, in an action which involves multiple claims, the district court may direct the entry of a final judgment upon one or more but less than all of the claims, provided that the district court makes an express determination that there is no just reason for

delay. 6 Moore's Federal Practice, § 56.17[15]. This Court has stated that Rule 54(b) orders "should not be entered routinely . . . [and] [t]he power which this Rule confers upon the trial judge should be used only in the infrequent harsh case . . . . In other words, there must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal." Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968); Arlinghaus v. Ritenour, 543 F.2d 461 (2d Cir. 1976).

There are two distinct reasons why Moretti may not rely on Rule 54(b) on this appeal:

(1) Rule 54(b) confers certain powers upon the trial judge. The standard for review is abuse of discretion. Gumer v. Shearson, Hammill & Co., Inc., 516 F.2d 283 (2d Cir. 1974). Here there is nothing to review, as the District Court declined to exercise its powers under that rule. We know of no authority for a Court of Appeals to enter judgment under Rule 54(b) when the District Court has refused to do so. If Moretti still believes it is entitled to judgment under Rule 54(b), Moretti should address that argument to the District Court.

(2) There is every reason (even apart from the running account between the parties) why Moretti's wheat claim and Continental's soybean claim should be settled and adjudged together, not separately, and why Rule 54(b) discretion should not be exercised in Moretti's favor:

-- In the soybean claim arbitration in London,

Continental has been awarded $1,493,520.00, plus interest, an amount far in excess of Moretti's claim for $449,386.96, plus interest (63-64, 77, 80). Consequently, it is clear that in the final analysis Moretti owes Continental far more than Continental owes Moretti. Moreover, Moretti has asserted that its commercial position has been injured (85-101; Mor. Br. 5-6), so that it is not clear that Moretti could satisfy the soybean award once it becomes final. It would be quite unfair to order Continental to make immediate payment on the wheat claim and have no security for its soybean claim;

-- It was Moretti who unsettled these obligations in the first instance: On February 10, 1976, Moretti repudiated the soybean contract, which at that time was terribly unfavorable to Moretti (55-56). One week after that repudiation, Moretti brought suit on the wheat credit notes, which did not state a date upon which payment was due (4-7, 28, 31). Moretti evidently thought that it was to Moretti's advantage to unsettle these obligations, which en toto were very unfavorable to Moretti. In this circumstance, it would be most unfair to order Continental to make immediate payment on the wheat contract, while Moretti resists the larger award on the soybean contract;

-- Moretti's has repeatedly affirmed that these claims are part of one dispute and should be resolved together (Br. 33).

-- Moretti's brief states no reasons why immediate judgment is required.* The law is clear that it is Moretti's burden to establish that there is "some danger of hardship or injustice through delay which would be alleviated by immediate appeal." Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968); Arlinghaus v. Ritnour, 543 F.2d 461 (2d Cir. 1976). Having failed even to address this burden, Moretti surely has not met it.

In short, had the District Court reached the Rule 54(b) issue -- which it did not -- it would have resolved that issue against Moretti.

The Running Account

The evidence indicates that there was a running account between the parties.

Consider Moretti's own complaint (4-7). Moretti complained that Continental "has not paid plaintiff the amount due under Credit Note No. 9113 . . . [and] Credit Note No. 9118" (6). In short, Moretti's claim is not for breach of the wheat contracts,

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* Moretti suggests without explanation that Pumice Aggregates v. Lep Chartering, 1 Ll. L. Rep. 529 (C.A. 1975), which Moretti characterizes as "an analogous case" (Mor. Br. 9), is authority for Moretti's contention that Continental's claim for set-off should be disregarded. That case involved a contract to charter a boat, and the court held that it was clear from the facts that plaintiff's contract was with defendant and not with defendant's subsidiary. The only thing the case stands for which is relevant to the proceeding at bar is that Moretti uses the term "analogous" rather loosely.

but for breach of the credit notes Continental issued to settle the wheat contracts.

Those credit notes are set forth at pages 28 and 31 of the Appendix. They are entitled "CREDIT NOTE". They bear numbers, 9113 and 9118. They state: "We credit your account as follows . . . ." They recite no fixed date for payment. They are persuasive documentary evidence that there was a running account between these parties.

And they are not the only evidence on this issue. There is also the sworn testimony of Mr. P. Eugene Bryant, Continental's Assistant Vice President, which sets forth the essentials of this arrangement, and which states that it is customary (55-57).

Of course, Moretti disagrees. Moretti has presented a sworn statement in which Moretti professes "amazement" at Mr. Bryant's view of the matter (75).

At the very least, this clash clearly presents an issue of fact, unripe for summary judgment.

CONCLUSION

For the reasons set forth in our main brief and for

the reasons set forth herein, the summary judgment below should be reversed.

Dated: New York, New York
July 19, 1977

Respectfully submitted,

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